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SUPREME COURT, U.S.

No. 80-5674

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GENERAL COPY

PAUL ROLAND HAMILTON,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

SUPPLEMENTAL BRIEF OF PETITIONER

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ATTORNEYS FOR PETITIONER

SUPPLEMENTAL QUESTION PRESENTED

Whether petitioner's death sentence may constitutionally be affirmed on the basis of one aggravating circumstance if his death sentence also rests in part upon another aggravating circumstance, Ga. Code Ann. §27-2534.1(b)(7), which has been misconstrued and misapplied in petitioner's case in violation of Godfrey v. Georgia, __U.S.__, 64 L.Ed.2d 398 (1980)?

TABLE OF CASES

	Page
Drake v. Zant, __U.S.__, 49 U.S.L.W. 3371 (U.S., Nov. 18, 1980)	2
Godfrey v. Georgia, __U.S.__, 64 L.Ed.2d 398 (1980)	2
Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980)	3
Stromberg v. California, 283 U.S. 359 (1931)	3
Westbrook v. Balkcom, __U.S.__, 49 U.S.L.W. 3371 (U.S. Nov. 18, 1980)	2

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Petitioner Paul Roland Hamilton submits this supplemental brief pursuant to Rule 22.6 of the Rules of the Court. Petitioner was sentenced to death after his trial jury found two statutory aggravating circumstances: (i)that he committed murder while "engaged in the commission of another capital felony" [1] and (ii) "that the offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim." [2]

1/ Ga. Code Ann. §27-2534.1(b)(2). The accompanying "capital felony" alleged in this case was armed robbery.

2/ Ga. Code Ann. §27-2534.1(b)(7).

After the judgment affirming petitioner's death sentence had been vacated by this Court in the wake of Godfrey v. Georgia, __U.S.__, 64 L.Ed.2d 398 (1980), the Supreme Court of Georgia reimposed a death sentence, reinterpreting subsection (b)(7)'s "outrageously or wantonly vile" aggravating circumstance so as to make it applicable to petitioner's case. Petitioner presently seeks certiorari on the ground, inter alia, that this application of subsection (b)(7) in his case is unconstitutional.

On November 17, 1980, subsequent to the filing of the present certiorari petition, the Court denied certiorari in two Georgia cases involving the "(b)(7)" aggravating circumstance. Westbrook v. Balkcom and Drake v. Zant, __U.S. __, 49 U.S.L.W. 3371 (U.S., Nov. 18, 1980)(No. 79-6615) and (No. 79-6704). Justice Stevens concurred in these denials and opposed remand to the Supreme Court of Georgia because of his perception that the Georgia court "would adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established by proof beyond a reasonable doubt, will not be set aside simply because one of those aggravating circumstances is vulnerable."

Lest the present petition be denied on a similar ground, petitioner would respectfully observe that even if the position of the Supreme Court of Georgia were clear as a matter of state law, that court's position itself presents a substantial federal

constitutional question. Indeed, in Stephens v. Zant, 631 F.2d 397 (5th Cir., Nov. 26, 1980), the Fifth Circuit has recently reached a conclusion in conflict with that of the Supreme Court of Georgia, holding that a capital inmate's "death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances either of which by itself would be legally sufficient to permit the jury to impose the death penalty," id., 631 F.2d at 406. The Stephens opinion relies on Stromberg v. California, 283 U.S. 359 (1931) and its progeny in addition to this Court's decisions stressing the special need for reliability in capital sentence determinations. */

Thus, if petitioner's claim that the subsection (b)(7) aggravating circumstance was misapplied in his case warrants a grant of certiorari, the effect on petitioner's death sentence of any state law rule purporting to authorize the affirmance of a death sentence because of the presence of a second aggravating circumstance itself would present a substantial federal constitutional question meriting review by this Court.

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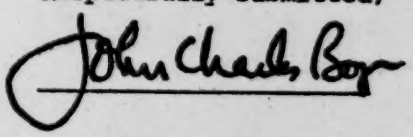
*/ Only two Justice of the Court have expressed opinions on the merits of this issue. Justice Stewart dissenting from the denial of certiorari in Martin v. Louisiana, __U.S.__, 49 U.S. L.W. 3370 (U.S., Nov. 18, 1980), expressing the view that Stromberg v. California, supra, required reversal of death sentences imposed under such circumstances. Justice White, dissenting from the denial of certiorari on other grounds in Drake and Westbrook, disagreed.

Dated: December 22, 1980

Respectfully submitted,



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CERTIFICATE OF SERVICE

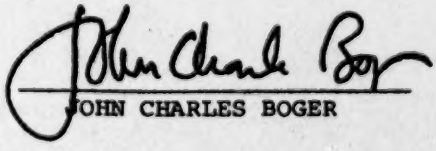
I hereby certify that I am a member of the bar of this Court and that I served the annexed Supplemental Brief of Petitioner on respondent by placing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

Hon. Mary Beth Westmoreland
Assistant Attorney General
132 State Judicial Bldg.
Atlanta, Georgia 30334

Hon. Michael K. Gardner
400 Chatham County Courthouse
133 Montgomery Street
Savannah, Georgia 31401

All parties required to be served have been served.

Done this 22nd day of December, 1980.



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